No. 94-671

In the Supreme Court of the United States

OCTOBER TERM, 1994

ADA ANISIA LOPEZ-AMARO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PHILEMINA MCNEILL JONES
FRANCESCO ISGRO
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Under Section 241(a)(2)(C) of the Immigration and Nationality Act, as amended in 1990, an alien is deportable if he has been convicted of illegal use of a firearm "at any time after entry." 8 U.S.C. 1251(a)(2)(C) (Supp. V 1993). That amendment applies even when "the facts * * * occurred before the date of the enactment of [the 1990] Act." Immigration Act of 1990, Pub. L. No. 101-649, § 602(c), 104 Stat. 5081-5082 (1990). The question presented is whether the 1990 amendment to Section 241(a)(2)(C) applies to convictions prior to the date of its enactment.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	3
Conclusion	5

TABLE OF AUTHORITIES

Cases:

Kin Sang Chow v. *INS*, 12 F.3d 34 (5th Cir. 1993)	4
Landgraf v. *USI Film Products*, 114 S. Ct. 1483 (1994)	4, 5
Mulcahey v. *Catalanotte*, 353 U.S. 692 (1957)	3
Rivers v. *Roadway Express, Inc.*, 114 S. Ct. 1510 (1994)	4, 5
United States v. *Yacoubian*, 24 F.3d 1 (9th Cir. 1994)	4

Statutes:

Immigration Act of 1990, Pub. L. No. 101-649, § 602(c), 104 Stat. 5081-5082	3, 4
Immigration and Nationality Act, § 241(a)(2)(C), 8 U.S.C. 1251(a)(2)(C) (Supp. V 1993)	2, 3, 4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-671

ADA ANISIA LOPEZ-AMARO, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. Ai-Axiv) is reported at 25 F.3d 986.

JURISDICTION

The judgment of the court of appeals was entered on July 12, 1994. The petition for a writ of certiorari was filed on October 11, 1994 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a citizen of Cuba. She was paroled into this country in 1972 and became a lawful permanent resident in 1977. In 1983, petitioner was convicted of first degree murder with a pistol, and that conviction was affirmed on appeal. In 1991, the Immigration and Naturalization Service instituted deportation proceedings against petitioner under Section 241(a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2)(C) (Supp. V 1993), which was amended in 1990 to provide that any alien convicted of a firearm offense is deportable. Pet. App. Aii-Aiii.

An immigration judge concluded that the Florida conviction was not a firearm offense and that, in any event, the 1990 amendment to Section 241(a)(2)(C) did not apply to petitioner because her 1983 conviction occurred prior to the amendment. Pet. App. Aiii; see Pet. App. Ci-Cxi. The Board of Immigration Appeals reversed. It held that petitioner's Florida conviction was a firearms offense and that the amendment to Section 241(a)(2)(C) applied retroactively to petitioner's conviction. Pet. App. Bi-Bxxi.

2. The court of appeals affirmed, Pet. App. Ai-Axiv, holding that Section 241(a)(2)(C) applies to aliens who were convicted prior to the 1990 amendment to that Section. *Id.* at Av. In reaching that conclusion, the court relied (*ibid.*) on the language of Section 241(a)(2)(C) making it applicable to aliens convicted "at any time after entry." 8 U.S.C. 1251(a)(2)(C) (Supp. V 1993). The court also relied (Pet. App. Av) on the separate provision in the 1990 Act stating that the Section, as amended, would apply "notwithstanding that * * * the facts, by reason of which an alien [is deportable], occurred before the date of the enactment of

this Act." Immigration Act of 1990, Pub. L. No. 101-649, § 602(c), 104 Stat. 5081-5082 (1990). The court noted that in *Mulcahey* v. *Catalanotte*, 353 U.S. 692 (1957), this Court had interpreted similar language as "indisputable" evidence that Congress was legislating retrospectively. Pet. App. Avi-Avii. The court therefore concluded that "by the use of the same language Congress was again legislating retroactively." *Id.* at Avii.

ARGUMENT

In 1990, Congress amended Section 241(a)(2)(C) of the Immigration and Nationality Act to make a conviction for illegal use of a firearm a ground for deportation. See 8 U.S.C. 1251(a)(2)(C) (Supp. V 1993). Petitioner contends that the amendment does not apply to convictions that occurred prior to its effective date. That contention is foreclosed by this Court's decision in *Mulcahey* v. *Catalanotte*, 353 U.S. 692 (1957).

In *Catalanotte*, an alien had been convicted of a drug trafficking offense in 1925. 352 U.S. at 692. In 1952, Congress made the conviction of such an offense a ground for deportation, and in 1953, the alien was ordered deported pursuant to that provision of the 1952 Act. The Court rejected the alien's contention that he was not subject to deportation because his drug trafficking conviction was not a ground for deportation at the time of the conviction. The Court noted that "[§] 241(a)(11) makes an alien deportable if he has 'at any time' been convicted of illicit traffic in narcotic drugs," and that "§ 241(d) makes § 241(a)(11) applicable to all aliens covered thereby 'notwithstanding * * * that the facts * * * occurred prior to the date of enactment of this Act.'" *Id.* at 694. The Court concluded that those Sections "specifically provide for the deportation of an alien notwithstanding that the offense for which he is

being deported occurred prior to the 1952 Act." *Ibid.* In light of the clear statutory text, the Court deemed it "indisputable" that "Congress was legislating retrospectively, as it may do, to cover offenses of the kind here involved." *Ibid.*

The statutory language at issue here is indistinguishable from the language at issue in *Catalanotte*. The Immigration Act of 1990 renders an alien deportable if he has "at any time" been convicted of a firearms offense. 8 U.S.C. 1251(a)(2)(C) (Supp. V 1993). The 1990 Act further provides that that ground for deportation is applicable "notwithstanding that * * * the facts * * * occurred before the date of the enactment of this Act." Pub. L. No. 101-649, § 602(c), 104 Stat. 5081-5082 (1990). Thus, as the court of appeals concluded, by using the same language that had been interpreted in *Catalanotte* to require retrospective application, "Congress was again legislating retroactively." Pet. App. Avii-Aviii.

The Fifth and Ninth Circuits are the only other courts of appeals that have addressed the question presented here. Both of those courts have similarly held that Section 241(a)(2)(C) applies to firearms convictions that occurred prior to the date of its amendment in 1990. See *Kin Sang Chow* v. *INS.*, 12 F.3d 34, 37 (5th Cir. 1993); *United States* v. *Yacoubian*, 24 F.3d 1, 6-7 (9th Cir. 1994).

Petitioner contends (Pet. 25-26) that to construe the amendment to Section 241(a)(2)(C) to apply to convictions entered prior to its enactment is inconsistent with *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483 (1994), and *Rivers* v. *Roadway Express, Inc.*, 114 S. Ct. 1510 (1994). There is, however, no such inconsistency. In *Landgraf*, the Court reaffirmed that an Act of Congress should not be interpreted to apply retroactively "absent clear congressional intent favoring such a result." 114

S. Ct. at 1505. Applying that canon of construction, the Court held in *Landgraf* and *Rivers* that certain sections of the Civil Rights Act of 1991 did not apply to cases pending on the date of enactment because there was no evidence that Congress clearly intended for those sections to apply retroactively. *Landgraf*, 114 S. Ct. at 1505-1508; *Rivers*, 114 S. Ct. at 1515-1517.

The situation here is very different. As discussed above, the text of the 1990 Act shows that Congress clearly intended for the amendment to Section 241(a)(2)(C) to apply retroactively, and this Court previously construed essentially identical language to have retrospective effect in *Catalanotte*. The decision below, construing Section 241(a)(2)(C) to have retroactive application, is therefore fully consistent with *Landgraf* and *Rivers*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

PHILEMINA MCNEILL JONES
FRANCESCO ISGRO
Attorneys

JANUARY 1995